Supreme Court, U.S.
FILED
No. 051079 FEB 21 2006
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In The

# Supreme Court of the United States

RAFAL PIETRZAK,

*Petitioner,*

v.

THE STATE OF TEXAS,

*Respondent.*

**On Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of Texas**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

The United States and Poland are party to the Vienna Convention on Consular Relations and its Optional Protocol Concerning the Compulsory Settlement of Disputes. Both countries are also party to The Consular Relations Convention and Protocols Signed at Warsaw May 31, 1972. Those treaties enable consular officers of either country to protect their citizens who are detained in the other country.

With the full participation of the United States, the International Court of Justice has rendered two judgments requiring that United States courts review claims concerning consular notification violations without regard to procedural default rules. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31); *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 104 (June 27).

Petitioner's state application for writ of habeas corpus asserting claims under the Vienna Convention and The Consular Relations Convention and Protocols Signed at Warsaw May 31, 1972, was denied on the basis of procedural default.

In state habeas corpus proceeding brought by a Polish foreign national, are Texas state courts required to give effect to the treaties and the *LaGrand* and *Avena* judgments by reviewing claims concerning failure to comply with consular notification requirements without regard to procedural default rules?

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## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## CITATIONS TO THE OPINION AND RELEVANT ORDERS

In an unpublished Order, the Court of Criminal Appeals of Texas adopted the trial court's findings and conclusions and denied relief on Petitioner's Application for Writ of Habeas Corpus. *Ex parte Rafal Ted Pietrzak*, Cause No. WR-49,639-03 (Tex. Crim. App. November 23, 2005) (mem.) (not designated for pub.). A copy of the Court of Criminal Appeals' Order is attached in Appendix 1.

In unpublished Findings of Fact and Conclusions of Law, the trial court adopted without any change the State's Proposed Findings of Fact and Conclusions of Law. *Ex parte Pietrzak*, No. W380-80392-97 (HC 3), slip op. (380th Jud. Dist. Ct., Collin County, Texas, June 7, 2005). A copy of the trial court's Order is attached in Appendix 2.

## GROUNDS FOR JURISDICTION

The Court of Criminal Appeals of Texas entered an Order denying Petitioner post-conviction *habeas corpus* relief on November 23, 2005. A copy of the Court of Criminal Appeals' Order appears at Appendix 1.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### United States Constitution, article II, section 2, clause 2

> The President. . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . . .

U.S. CONST. art. II, § 2, cl. 2.

### United States Constitution, article VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

### Vienna Convention on Consular Relations and Optional Protocol on Disputes

Because of its length, this provision is attached in Appendix 3. *See* SUP. CT. R. 14(f). The citation to this provision is: Vienna Convention on Consular Relations and Optional Protocol on Disputes art. 36, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

### Consular Relations Convention and Protocols Signed at Warsaw

Because of its length, this provision is attached in Appendix 4. *See* SUP. CT. R. 14(f). The citation to this provision is: Consular Relations Convention and Protocols Signed at Warsaw art. 29, May 31, 1972, 24 U.S.T. 1231.

### Article 11.07, Texas Code of Criminal Procedure

Because of its length, this provision is attached in Appendix 5. *See* SUP. CT. R. 14(f). The citation to this provision is: TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 2005).

## STATEMENT OF THE CASE AND PROCEEDINGS BELOW

### Nature of the Case

Petitioner was convicted of aggravated sexual assault of a child and sentenced to thirty (30) years in prison and a $10,000.00 fine by a Collin County, Texas, jury. Petitioner's conviction and sentence were affirmed on direct appeal. Petitioner then filed an Application for Writ of Habeas Corpus in Texas state court which was denied. Petitioner then filed the instant Application for Writ of Habeas Corpus which was ultimately denied by the Court of Criminal Appeals of Texas.

### Course of Proceedings and Disposition Below

By an indictment filed April 29, 1997, Petitioner was charged with one count of aggravated sexual assault and

one count of injury to a child in trial court cause number 380-80392-97.[1 C.R.[1] 5-7]

A Collin County, Texas, jury convicted Petitioner of aggravated sexual assault of a child.[1 C.R. 3] The same jury assessed Petitioner's sentence at thirty (30) years' confinement in the Institutional Division of the Texas Department of Criminal Justice and a $10,000.00 fine.[1 C.R. 3; 4 C.R. 648] Judgment was entered on March 3, 1998.[4 C.R. 650-52]

Acting through counsel, Petitioner filed notice of appeal on June 2, 1998.[4 C.R. 687-88, 689] However, that notice was filed one day late, so Petitioner's appeal was dismissed. *Pietrzak v. State*, No. 05-98-1016-CR, slip op. (Tex. App. – Dallas 2000, pet. ref'd) (not designated for publication).

On May 17, 2001, Petitioner filed a *pro se* Application for Writ of Habeas Corpus in the trial court.[2] In this Application, Petitioner argued *inter alia* that he had received ineffective assistance of counsel because his attorney failed to timely file the notice of appeal. On September 19, 2001, the Court of Criminal Appeals granted relief to Petitioner in the form of reinstating his case into a position where he could timely pursue a direct appeal. *Ex parte Rafal Ted Pietrzak*, No. 74,173, slip op. (Tex. Crim. App. 2001) (mem.) (not designated for publication).

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[1] Hereinafter, the abbreviation C.R. will be used as citation for the Clerk's Record volumes of the appellate record and the abbreviation R.R. will be used as citation for the Reporter's Record volumes of the appellate record.

[2] *See* TEX. CODE CRIM. PROC. ANN. art. 11.07, § 3 (Vernon 2005).

Pursuant to the Order granting him *habeas corpus* relief, Petitioner pursued direct appeal review of his conviction and sentence. On January 23, 2003, Petitioner's conviction and sentence were affirmed on direct appeal. *Pietrzak v. State*, No. 05-01-1687-CR, slip op. (Tex. App. – Dallas 2003, no pet.) (not designated for pub.).

On August 14, 2003, Petitioner filed a second Application for Writ of Habeas Corpus in the trial court.[3] This Application contained three claims alleging that Petitioner received ineffective assistance of counsel at trial, that his due process rights were violated as a result of jury misconduct, and that his due process rights were violated because he was not given notice of the trial court's intention to appoint a special judge.

On July 7, 2004, the State filed its Response and Proposed Findings of Fact and Conclusions of Law. Five days later, on July 12, 2004, the trial court adopted the State's Proposed Findings and Conclusions *in toto* and signed Findings of Fact and Conclusions of Law recommending that the Court of Criminal Appeals deny relief to Petitioner. On November 24, 2005, the Court of Criminal Appeals of Texas accepted the trial court's findings of fact and conclusions of law and denied relief without a written order. *Ex parte Rafal Ted Pietrzak*, Cause No. WR-49,639-02 (Tex. Crim. App. November 24, 2004) (mem.) (not designated for pub.).

On May 5, 2005, Petitioner filed a third Application for Writ of Habeas Corpus in the trial court.[4] In this

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[3] *See* TEX. CODE CRIM. PROC. ANN. art. 11.07, § 3 (Vernon 2005).

[4] *See* TEX. CODE CRIM. PROC. ANN. art. 11.07, § 3 (Vernon 2005).

Application, Petitioner asserted claims, which had not previously been asserted on direct appeal or in *habeas corpus* proceedings, that his consular notification rights under both Article 36 of the Vienna Convention and Article 29 of the Consular Relations Convention and Protocols Signed at Warsaw May 31, 1972, had been violated. Petitioner also specifically directed the court to this Court's grant of certiorari in *Medellin v. Dretke*, 543 U.S. 1042 (2004) (mem.). In that case, this Court had agreed to decide whether state and/or federal courts in the United States must or should give effect to decisions of the I.C.J. *Avena* and *LaGrand* requiring that courts in the United States must review and reconsider foreign national's convictions and sentences taking account of any violations of the foreign national's rights under the Vienna Convention without resort to procedural default doctrines.[5]

The State filed its Response and Proposed Findings of Fact and Conclusions of Law on June 6, 2005. One day later, on June 7, 2005, the trial court entered Findings of Fact and Conclusions of Law identical to the State's proposed Findings and Conclusions and recommended that the Court of Criminal Appeals of Texas dismiss the Application on the grounds that the consular notification claims are procedurally barred because they were available, but not raised in the article 11.07 Application filed in August 2003. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07,

[5] Shortly after Petitioner filed the instant Application, this Court dismissed the writ of certiorari in *Medellin* as improvidently granted. *See Medellin v. Dretke*, 125 S. Ct. 2088, 2092 (2005) (per curiam). Interestingly, the reason this Court dismissed *Medellin* was because of developments which allowed him to attempt to litigate his consular notification claims in Texas state courts and argue that procedural default rules should not apply. *Id.* at 2090-92.

§ 4 (Vernon 2005) (setting forth limited circumstances under which claims raised in subsequent application can be considered on the merits).

On November 23, 2006, the Court of Criminal Appeals of Texas accepted the trial court's findings of fact and conclusions of law and denied relief without a written order.[6] *Ex parte Rafal Ted Pietrzak*, Cause No. WR-49,639-03 (Tex. Crim. App. November 23, 2005) (mem.) (not designated for pub.).

**The Relevant Facts**

Petitioner is now and was during the investigation and trial of this case, a citizen of Poland. On or about December 3, 1996, Petitioner was detained by law-enforcement officers investigating the offense for which Petitioner was ultimately convicted. Upon this detention, the officers failed to (1) notify Petitioner of his right to request assistance from the Polish Consulate; (2) notify the Polish Consulate that Petitioner had been detained, and (3) permit officers of the Polish Consulate to render assistance to Petitioner, including arranging for competent legal representation.

Petitioner gave an approximately three and one-half (3½) hour video-taped statement arising from this detention which was admitted into evidence against him at trial. Petitioner also gave a written statement arising from the December 3, 1996, detention which was admitted

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[6] *See* TEX. CODE CRIM. PROC. ANN. art. 11.07, § 5 (Vernon 2005) (Court of Criminal Appeals may "deny relief upon the findings and conclusions of the hearing judge without docketing the cause").

against him at trial. Finally, arising from the December 3, 1996, detention, Petitioner wrote a "note of apology" to the alleged injured party which was admitted against him at trial.

If the law enforcement officers had notified Petitioner of his right to request assistance from the Polish Consulate, he would have done so and would ultimately have refused to give any statement, including the video-taped and written statements. Petitioner would also have asserted his Constitutional right to counsel with the help of officers of the Polish Consulate.

If law enforcement officers had notified the Polish Consulate that Petitioner had been detained, the Consulate would have (1) immediately sent a representative to speak with Petitioner, and (2) assisted Petitioner in retaining competent and qualified counsel who would surely have advised Petitioner not to make any statement to the police.

Finally, if the Polish Consulate had been notified that Petitioner was in custody awaiting trial, the Consulate would have assisted Petitioner in retaining competent and qualified counsel to represent him and would also have assisted the defense by insuring that investigative and expert assistance was available to Petitioner for trial. Finally, the Consulate would have aided pre-trial preparation of Petitioner's trial counsel in the form of assistance with investigation to be conducted in Poland which would have yielded, at a minimum, evidence that was admissible in the form of mitigation evidence at punishment.

## ARGUMENT AND AUTHORITIES

**THE COURT OF CRIMINAL APPEALS OF TEXAS ERRED BY DISPOSING OF PETITIONER'S CONSULAR NOTIFICATION CLAIMS ON THE BASIS OF PROCEDURAL DEFAULT BECAUSE, UNDER THE VIENNA CONVENTION, THE CONSULAR RELATIONS CONVENTION AND PROTOCOLS SIGNED AT WARSAW, AND THE INTERNATIONAL COURT OF JUSTICE'S DECISIONS IN *AVENA* AND *LaGRAND*, STATE COURTS ARE REQUIRED TO ADDRESS THE MERITS OF THESE TYPES OF CLAIMS REGARDLESS OF PROCEDURAL DEFAULT DOCTRINES.**

### A) Background

#### 1) The Vienna Convention

Article 36 of The Vienna Convention establishes an interrelated regime of rights that enables consular officers to protect nationals who are detained in foreign countries. Vienna Convention on Consular Relations and Optional Protocol on Disputes art. 36, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Article 36(1)(b) requires the authorities of the detaining state to notify "without delay" a detained foreign national of his right to request assistance from the consul of his own state and, if the national so requests, to inform the consular post of that national's arrest or detention, also "without delay." *Id.* Article 36(1)(a) and (c) require the detaining country to permit the consular officers to render various forms of assistance, including arranging for legal representation. *Id.* Finally, Article 36(2) requires that a country's "laws and regulations . . . enable full effect to be given to the

purposes for which the rights accorded under this Article are intended." *Id.*

The United States and Poland have both signed and ratified The Vienna Convention.

### 2) The Consular Relations Convention and Protocols Signed at Warsaw May 31, 1972

Article 29 of The Consular Relations Convention and Protocols Signed at Warsaw May 31, 1972, enables consular officers of Poland to protect Polish nationals who are detained in the United States. Convention and Protocols Signed at Warsaw art. 29, May 31, 1972, 24 U.S.T. 1231. Article 29(2) requires United States authorities who detain or arrest a Polish citizen who has not been admitted to permanent residence in the United States to "immediately inform" the Polish Consulate of the detention or arrest. Articles 29(1), (3), and (4) collectively require that, after the required notification, the Polish Consulate has an absolute right to confer with and advise the detained or arrested Polish citizen, including arranging for legal representation. Article 29(4) specifically provides that the Polish Consulate has a right to be present at the trial of any Polish citizen.

The United States and Poland both signed and ratified The Consular Relations Convention and Protocols.

### 3) The *Avena* Judgment

On January 9, 2003, the Government of Mexico initiated proceedings in the International Court of Justice (hereinafter, "I.C.J.") against the United States, alleging

violations of the Vienna Convention in the cases of 54 Mexican nationals who had been sentenced to death in state criminal proceedings in the United States. *See Mexico's Application Instituting Proceedings (Mex. v. U.S.)*, No. 128 (Avena and Other Mexican Nationals) (I.C.J. Jan. 9, 2003).[7] The United States fully participated in the proceeding including filing exhaustive briefing and being represented by an 18-person team during the hearing conducted by the I.C.J.

On March 31, 2004, the I.C.J. issued its Judgment. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31) (hereinafter, "*Avena Judgment*"). First, the I.C.J. expressly held that the United States had breached Article 36(1)(b) in the cases of 51 of the Mexican nationals by failing "to inform detained Mexican nationals of their rights under that paragraph" and "to notify the Mexican consular post of the[ir] detention." *Avena Judgment*, paras. 106(1)-(2), 153(4) (244A-245A, 272A).

Second, the I.C.J. held that in 49 cases, the United States had violated its obligations under Article 36(1)(a) "to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1(c) of that Article regarding the right of consular officers to visit their detained nationals." *Id.*, paras. 106(3), 153(5)-(6)(245A, 273A). The I.C.J. also held that in 34 cases, the breaches of Article 36(1)(b) also violated the United States's obligation under paragraph 1(c) "to enable Mexican consular officers to arrange for

[7] The parties' written and oral pleadings as well as the orders and press releases of the Court in the *Avena* case are available at http://www.icj-cij.org/icjwww/idecisions.htm.

legal representation of their nationals." *Id.*, paras. 106(4), 153(4), 153(7)(245A-246A, 272A, 273A).

Finally, as to remedies, I.C.J. held that United States courts must provide review and reconsideration of the convictions and sentences tainted by the violations it had found. *Id.*, paras. 121-22, 153(9) (254A, 274A). The I.C.J. explained: (1) that the required review and reconsideration must take place as part of the "judicial process;" (2) that procedural default doctrines could not bar the required review and reconsideration; (3) that the review and reconsideration must take account of the Article 36 violation on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right; and (4) that the forum in which the review and reconsideration occurred must be capable of "examin[ing] the facts, and in particular the prejudice and its causes, taking account of the violation of the rights set forth in the Convention." *Id.*, paras. 113-14, 122, 134, 138-39, 140 (249A-250A, 254A, 259A-260A, 262A-263A).

The Avena Judgment built on the Court's earlier holdings in *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 104 (June 27) (hereinafter, "*LaGrand Judgment*"), which Germany also brought on the basis of the Optional Protocol, and in which the United States also fully participated. In *LaGrand*, the I.C.J. held as follows: (1) Article 36 of the Vienna Convention provides "individual rights" to foreign nationals; (2) by applying procedural default rules in the circumstances of those cases, the United States had applied its own law in a manner that failed to give full effect to the rights accorded under Article 36(1) and hence violated Article 36(2); and, (3) if the United States failed to comply with Article 36 in future cases involving German nationals who were subjected to severe penalties, it must

"allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention." *LaGrand Judgment*. paras. 77, 90-91, 125.

### B) The Vienna Convention and the Optional Protocol, the Consular Relations Convention and Protocols Signed at Warsaw, and the *Avena* Judgment are Binding Law on Texas State Courts

The United States Constitution provides that the President "shall have Power . . . to make Treaties." U.S. CONST. art. II, § 2, cl. 2. The President may do so, however, only "with the Advice and Consent of the Senate." *Id.* For the Senate to grant consent, "two thirds of the Senators present [must] concur." *Id.* In this manner, the Constitution ensures that the United States takes on international treaty obligations only with the clear support of the democratically elected representatives of the American people. *See generally* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 36-37 (2d ed. 1996).

The Supremacy Clause provides that, "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; *and all Treaties made, or which shall he made, under the Authority of the United States*, shall be the supreme Law of the Land; and the Judges *in every State* shall be bound thereby, *any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*" U.S. CONST. art. VI, cl. 2 (emphasis added). Accordingly, a ratified treaty:

> is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which

> the rights of the private citizen or subject may he determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

*Edye v. Robertson (Head Money Cases)*, 112 U.S. 580, 598-99 (1884) (emphasis added).

The treaty obligations reflected in the Vienna Convention and its Optional Protocol are entirely self-executing; they required no implementing legislation to come into force. *See Hearing Before the Senate Comm. on Foreign Rel., S. Exec. Rep. No. 91-9*, 91st Cong. at 5 (1st Sess. 1969) (statement of J. Edward Lyerly, Deputy Legal Adviser for Administration, U.S. Department of State). As President Richard M. Nixon stated when he announced their entry into force:

> the [Vienna] Convention and Protocol ... and every article and clause thereof shall be observed and fulfilled with good faith, on and after December 24, 1969, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

21 U.S.T. 77.

Likewise, when he announced the entry of Consular Relations Convention and Protocols Signed at Warsaw into force, he proclaimed that:

> the Convention of May 31, 1972 and the related Protocols to the end that they shall be observed and fulfilled with good faith on and after July 6, 1973 by the United States of America and by the

> citizens of the United States of America and all other persons subject to the jurisdiction thereof.

24 U.S.T. 1231.

### C) The Court Should Ensure the United States's Compliance with its International Obligations

Because the Vienna Convention and its Optional Protocol are fully effective binding law under the supremacy clause, the Court of Criminal Appeals of Texas should have been required to apply the reasoning of *Avena* and review the merits of Petitioner's consular notification claims without regard to the procedural default rules found in article 11.07, section 4, Texas Code of Criminal Procedure. In other words, the United States was committed to abide the *Avena* judgment and Texas state courts were likewise required to do so.

This Court should grant the petition in order to prevent the breach of treaty that would otherwise result from the Court of Criminal Appeals' error. The Framers gave treaties the status of supreme federal law and included cases arising under treaties within the federal judicial power precisely in order to enable this Court to prevent the lower state courts from breaching an international obligation by refusing to enforce a treaty or other international obligation. U.S. CONST. art. II, § 2, cl. 2; art VI, cl. 2.

As James Madison emphasized at the Constitutional Convention:

> The tendency of the States to th[e] violations [of the law of natures and of treaties] has been

> manifested in sundry instances. . . . A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole.

1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (Max Farrand ed., rev. ed. 1966). Alexander Hamilton made the same point when he said that "the peace of the whole ought not to be left at the disposal of a part," so that "the responsibility for an injury ought ever to be accompanied with the faculty of preventing it." THE FEDERALIST No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961). To achieve that end, the Framers gave this Court the final authority to ensure enforcement of our treaty obligations.

The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one supreme tribunal. THE FEDERALIST No. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

This case presents precisely the circumstances in which the Framers expected this Court to intervene. Acting on behalf of the United States, the President, with the consent of the Senate, agreed to abide by the decisions of the I.C.J. which means that the United States agreed to abide the *Avena* decision. But the Court of Criminal Appeals of Texas, has concluded that the State of Texas does not have to abide the portion of *Avena* that requires resolution of the merits of Petitioner's claims without regard to procedural default. In this manner, the Court of Criminal Appeals of Texas has forced the United States as

a whole not to comply with its binding treaty obligations and has effectively decided an important decision of federal law – whether state procedural default rules apply to consular notification claims after *Avena* – which has not been, but should be, settled by this Court. *See* SUP. CT. R. 10(c).

Left undisturbed, the decision of the Court of Criminal Appeals of Texas is the kind of "national calamit[y]" against which Madison warned – it sends a message to the world that we preach, but do not practice, adherence to the rule of law. This amounts to a radical departure from the accepted course of judicial proceedings which warrants the exercise of this Court's supervisory power. *See* SUP. CT. R. 10(a).

### D) The Court Should Grant The Petition in Order To Resolve The Conflict Between This Court's Opinion in *Breard v. Greene* and the I.C.J.'s Judgments in *Avena* and *LaGrand*

In *Breard v. Greene*, 523 U.S. 371 (1998), by a brief *per curiam* order, this Court refused to stay the imminent execution of a foreign national who had been convicted and sentenced to death in proceedings that Virginia conceded had violated the Vienna Convention, but who had been held to have procedurally defaulted the Vienna Convention claim. This Court observed that the Convention "arguably" conferred an individual right that the foreign national, as well as the State party to the Convention, could enforce. *Id.* at 376. It stated, however, that as a matter of international law, absent a clear and express statement to the contrary, implementation of the Vienna Convention was subject to the procedural rules of the forum state. *Id.* at

375. Hence, this Court concluded, the Convention did not preclude the United States from procedurally barring Breard's claim. *Id.*

Since *Breard*, the legal universe has fundamentally changed. In its 2001 *LaGrand Judgment*, the I.C.J. expressly held that the Vienna Convention conferred rights on the individual national as well as the sending State. Further, *LaGrand* also held that the application of a procedural default doctrine to bar a Vienna Convention claim when the receiving State had failed in its obligation to advise the foreign national of his or her Vienna Convention rights constituted a violation of Article 36(2) of the Convention. *LaGrand Judgment*, paras. 77, 90-91. Needless to say, this Court did not have the benefit of those specific holdings on the interpretation and application of the Vienna Convention when it made its more general observations in the *Breard* order.

In *Avena*, the I.C.J. reiterated both of those holdings. Specifically, the I.C.J. held that the United States had violated Article 36(1) of the Convention by failing to afford many of the Mexican nationals the opportunity to secure the assistance of the Mexican consul, and – most importantly for purposes of this case – that under Article 36(2), United States courts could not apply procedural default doctrines to avoid adjudicating on the merits the impact of the violation on the proceedings that led to the convictions and sentences. *See Avena Judgment*, paras. 128-134, 140 (257A-260A, 263A).

This Court should resolve the conflict between *Breard* and the holdings of the I.C.J. in *LaGrand* and *Avena* on the issue of whether Article 36(2) precludes the application of procedural default doctrines when the United States or

a state has failed in its obligation of consular notification. This issue will be faced again and again by both state and federal courts addressing applications by other foreign nationals seeking to invoke the authority of *Avena* and *LaGrand*. Therefore, this amounts to an important question of federal law that has not been, but should be settled by this Court. *See* SUP. CT. R. 10(c).

### E) The Court Should Grant the Petition To Ensure International Judicial Comity and Uniform Treaty Interpretation

The I.C.J.'s rulings in *LaGrand* and *Avena* should be given effect in the interest of international comity and uniform treaty interpretation.

#### 1) International Judicial Comity

This Court has long promoted the goal of comity between the courts of different nations. *See, e.g., Hilton v. Guyot*, 159 U.S. 113, 164 (1895). In a world of enormous economic interdependence and regular international travel and migration, the courts of more than one nation will frequently have jurisdiction to address disputes arising from any given course of events. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 421 (1987). As a result, federal and state courts in the United States frequently accord respect to proceedings from the courts of another country.[8]

[8] That respect can take a variety of forms, including: the recognition of a foreign judgment, *see Hilton v. Guyot*, 159 U.S. 113, 164 (1895); forbearance from adjudicating a given case in favor of more efficient proceedings before the courts of a foreign country, *see Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22, 257-61 (1981); forbearance from

(Continued on following page)

This "comity of courts" cannot be confined to the judgments and proceedings of national courts. The subject matter and frequency of international adjudication continue to expand. *See, e.g.*, Dietmar Prager, *The Proliferation of International Judicial Organs*, *in* PROLIFERATION OF INTERNATIONAL ORGANIZATIONS 279 (Niels M. Blokker et al., eds., 2001). As individual States continue to entrust the resolution of specific categories of disputes to international tribunals, courts in those individual States should extend the same respect to those international tribunals.

This case presents the most compelling opportunity possible for according judicial comity to the ruling of an international tribunal. Not only has the United States agreed to the jurisdiction exercised by the I.C.J., the most important court in the international legal system, but the I.C.J., in rendering its judgment, has itself sought to engage the United States courts in a collaborative judicial enterprise. Specifically, though the I.C.J. had jurisdiction to grant Mexico's request for annulment of the convictions and sentences, *see Avena Judgment*, para. 119 (252A-253A), it chose not to do so. Instead, the I.C.J. ordered that the United States courts themselves conduct review and reconsideration of the convictions and sentences tainted by the violations, in accord with the criteria laid down in the

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exercising jurisdiction in recognition of the greater interest of a foreign country, *see Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 818-19 (1993) (Scalia J., dissenting); and forbearance from interference by antisuit injunction with proceedings in the courts of another country, *see Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349, 1354-55 (6th Cir. 1992). *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985) (enforcing agreement to arbitrate before foreign arbitral tribunal); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 8-9 (1972) (enforcing agreement to litigate before foreign court).

judgment, and then fashion relief for any prejudice. *Id.*, para. 153(9) (274A).

"If an international tribunal recognizes the importance of the national courts of the countries within its jurisdiction as enforcers of its decision, it is inviting a kind of judicial cooperation that melds the once distinct planes of national and international law." Anne Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 194 (2003); *see also* Anne Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708 (1998). This Court should accept that invitation by granting this Petition to ensure compliance by both state and federal courts in the United States with the "authoritative interpretation of Article 36" pronounced in the *LaGrand* and *Avena* Judgments. *See Torres v. Mullin*, 124 S. Ct. 919, 919 (2003) (Stevens, J.) (op. on denial of cert.).

### 2) Uniform Treaty Interpretation

The parties to a treaty should be presumed to intend a uniform interpretation in all jurisdictions in which the treaty may apply. *See Olympic Airways v. Husain*, 540 U.S. 644, 660-61 (2004) (Scalia, J., dissenting). Here the United States and some 44 other signatories to the Convention also agreed to submit disputes concerning the interpretation and application of the treaty for binding adjudication by the I.C.J. Surely those parties' agreement to that single forum strengthens the presumption that the parties were looking for a consistent interpretation of the treaty provisions. It follows that a State party to the Vienna Convention should defer to the interpretation of the Convention by the I.C.J., especially when that State was a party to and actively participated in the proceeding which resulted in the interpretation.

The *Avena Judgment* itself demonstrates that the I.C.J. had responsibility to ensure uniform interpretation of the Vienna Convention. The I.C.J. stated that it had approached the case "from the viewpoint of the general application of the Vienna Convention" and advised that its interpretation and application of the Convention would apply in any future cases between parties to the Convention. *See Avena Judgment*, para. 151 (269A-270A).

Accordingly, this Court should reciprocate by granting this Petition in order to ensure that state and federal courts in the United States abide by the I.C.J.'s authoritative interpretation of the Convention.

## PRAYER

Petitioner therefore prays that this Court will grant this Petition, order such further briefing as this Court feels appropriate, and remand this cause with directions that the Court of Criminal Appeals of Texas consider Petitioner's consular notification claims without regard to procedural default rules.

Respectfully submitted,

WILLIAM REAGAN WYNN
State Bar No. 00797708 (Texas)

THE KEARNEY LAW FIRM
505 Main Street, Suite 220
Fort Worth, Texas 76102
(817) 336-5600
(817) 336-5610 (fax)

*Attorney For Petitioner*
*Rafal Pietrzak*

**APPENDIX 1**

OFFICIAL NOTICE FROM COURT OF CRIMINAL
APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

RE: Writ No. WR-49, 639-03
STYLE: Pietrzak, Rafal Ted
TRIAL CT NO: W380-80392-97 (HC3)
11/23/2005

This is to advise that the Court has denied without written order the application for writ of habeas corpus.

Louise Pearson, Clerk

Wm. Reagan Wynn
The Kearney Law Firm
Wells Fargo Bldg.
505 Main Street, Ste. 220
Ft. Worth, TX 76102

**APPENDIX 2**

**NO. W380-80392-97 (HC3)**

| | | |
|---|---|---|
| **EX PARTE** | § | **IN THE 380TH JUDICIAL** |
| | § | **DISTRICT COURT OF** |
| **RAFAL TED PIETRZAK** | § | **COLLIN COUNTY, TEXAS** |

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After review of the trial record, Applicant's application for writ of habeas corpus, and the State's Response, and upon the Court's personal recollection, the Court makes the following findings of fact and conclusions of law:

**Findings of Fact**

(a) Applicant was convicted of aggravated sexual assault of a child younger than fourteen years old, and his sentence was affirmed by the court of appeals.

(b) In 2001, the International Court of Justice decided the case of *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27).

(c) In August 2003, Applicant filed his first post-conviction application for writ of habeas corpus.

(d) That application did not contain the claims Applicant raises in this application.

(e) On November 24, 2004, the Court of Criminal Appeals denied Applicant's first post-conviction

application for writ of habeas corpus without written order.

(f) This is Applicant's second post-conviction application for writ of habeas corpus.

(g) This application does not contain sufficient specific facts establishing that the current claims and issues could not have been presented previously in Applicant's initial post-conviction application for writ of habeas corpus.

**Conclusions of Law**

(a) The legal basis for Applicant's claims was available at the time he filed his initial post-conviction application for writ of habeas corpus.

(b) Applicant's claims are barred by Texas Code of Criminal Procedure article 11.07, section 4 because they were not presented in his initial post-conviction application for writ of habeas corpus.

**Recommendation**

This Court, having considered the evidence, finds that Applicant's claims are barred by article 11.07, section 4. This Court finds the State's Response correct and adopts it as its own. Wherefore, this Court recommends that the Court of Criminal Appeals **DISMISS** Applicant's claims.

**The Clerk of this Court** is directed to send copies of these Findings of Fact and Conclusions of Law to (1) The Court of Criminal Appeals; (2) Counsel for Applicant, Wm. Reagan Wynn, The Kearney Law Firm, Wells Fargo Building, 505 Main Street, Suite 220, Fort Worth, Texas

76102; and (3) the Appellate Division of the Collin County District Attorney's Office.

SIGNED this 7 day of June, 2005.

/s/ Charles Sandoval
JUDGE PRESIDING

## APPENDIX 3

**Vienna Convention on Consular Relations and Optional Protocol on Disputes art. 36, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.**

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS the Vienna Convention on Consular Relations and the Optional Protocol Concerning the Compulsory Settlement of Disputes were signed at Vienna on April 24, 1963;

WHEREAS the texts of the Convention and Protocol, as certified for the Secretary-General of the United Nations, are word for word as follows:

UNITED NATIONS CONFERENCE
ON CONSULAR RELATIONS

VIENNA CONVENTION ON
CONSULAR RELATIONS

UNITED NATIONS

1964

VIENNA CONVENTION ON CONSULAR RELATIONS

The States Parties to the present Convention,

Recalling that consular relations have been established between peoples since ancient times, Having in mind the Purposes and Principles of the Charter of the United Nations[1] concerning the sovereign equality of

[1] TS 993; 59 Stat. 1031

States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,[2] Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,

Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

. . . .

Article 36

Communication and contact
with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

[2] 500 UNTS 95.

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

. . . .

# UNITED NATIONS CONFERENCE ON CONSULAR RELATIONS

## VIENNA CONVENTION ON CONSULAR RELATIONS

## OPTIONAL PROTOCOL CONCERNING THE COMPULSORY SETTLEMENT OF DISPUTES

## UNITED NATIONS

## 1964

## VIENNA CONVENTION ON CONSULAR RELATIONS

## OPTIONAL PROTOCOL CONCERNING THE COMPULSORY SETTLEMENT OF DISPUTES

The States Parties to the present Protocol and to the Vienna Convention on Consular Relations, hereinafter referred to as "the Convention", adopted by the United Nations Conference held at Vienna from 4 March to 22 April 1963,

Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon by the parties within a reasonable period,

Have agreed as follows:

### Article I

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application

made by any party to the dispute being a Party to the present Protocol.

Article II

The parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort not to the International Court of Justice but to an arbitral tribunal. After the expiry of the said period, either party may bring the dispute before the Court by an application.

Article III

1. Within the same period of two months, the parties may agree to adopt a conciliation procedure before resorting to the International Court of Justice.

2. The conciliation commission shall make its recommendations within five months after its appointment. If its recommendations are not accepted by the parties to the dispute within two months after they have been delivered, either party may bring the dispute before the Court by an application.

Article IV

States Parties to the Convention, to the Optional Protocol concerning Acquisition of Nationality,[FN6] and to the present Protocol may at any time declare that they will extend the provisions of the present Protocol to disputes arising out of the interpretation or application of the Optional Protocol concerning Acquisition of Nationality. Such declarations shall be notified to the Secretary-General of the United Nations.

Article V

The present Protocol shall be open for signature by all States which may become Parties to the Convention as follows: until 31 October 1963 at the Federal Ministry for Foreign Affairs of the Republic of Austria and, subsequently, until 31 March 1964, at the United Nations Headquarters in New York.

Article VI

The present Protocol is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article VII

The present Protocol shall remain open for accession by all States which may become Parties to the Convention. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article VIII

1. The present Protocol shall enter into force on the same day as the Convention or on the thirtieth day following the date of deposit of the second instrument of ratification or accession to the Protocol with the Secretary-General of the United Nations, whichever date is the later.

2. For each State ratifying or acceding to the present Protocol after its entry into force in accordance with paragraph 1 of this Article, the Protocol shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article IX

The Secretary-General of the United Nations shall inform all States which may become Parties to the Convention:

(a) of signatures to the present Protocol and of the deposit of instruments of ratification or accession, in accordance with Articles V, VI and VII;

(b) of declarations made in accordance with Article IV of the present Protocol;

(c) of the date on which the present Protocol will enter into force, in accordance with Article VIII.

Article X

The original of the present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States referred to in Article V.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised thereto by their respective Governments, have signed the present Protocol.

DONE AT VIENNA, this twenty-fourth day of April, one thousand nine hundred and sixty-three.

. . . .

15 April 1964

WHEREAS the Senate of the United States of America by its resolution of October 22 1969, two-thirds of the Senators present concurring therein, did advise and consent to the ratification of the Convention and Protocol;

WHEREAS the Convention and Protocol were ratified by the President of the United States of America on November 12, 1969, in pursuance of the advice and consent of the Senate;

WHEREAS it is provided in paragraph 1 of Article 77 of the Convention that the Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession and it is provided in paragraph 2 of Article 77 that for each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession;

WHEREAS the following twenty-two States deposited instruments of ratification of the Convention, or, as noted deposited instruments of accession: Ghana on October 4, 1963, Dominican Republic on March 4, 1964, Algeria (accession) on April 14, 1964, Tunisia (accession) on July 8, 1964, Upper Volta on August 11, 1964, Yugoslavia on February 8, 1965, Gabon on February 23, 1965, Ecuador on March 11, 1965, Switzerland on May 3, 1965, Mexico, with a reservation, on June 16, 1965, United Arab Republic, with reservations, (accession) on June 21, 1965, Kenya (accession) on July 1, 1965, Nepal (accession) on September 28, 1965, Cuba, with a reservation, on October 15, 1965, Trinidad and Tobago (accession) on October 19, 1965, Venezuela on October 27, 1965, Philippines on November 15, 1965, Niger on April 26, 1966, Senegal (accession) on April 29, 1966, Liechtenstein on May 18, 1966, Costa Rica on December 29, 1966, and Madagascar (accession) on February 17, 1967;

WHEREAS, pursuant to the provisions of paragraph 1 of Article 77 of the Convention, the Convention entered into force for the above-mentioned States on March 19, 1967;

WHEREAS after deposit of instruments of ratification or accession by the above-mentioned twenty-two States, the following States deposited instruments of ratification of the Convention, or, as noted, deposited instruments of accession: Argentina on March 7, 1967, Ireland on May 10, 1967, Brazil on May 11, 1967, Cameroon on May 22, 1967, Panama on August 28, 1967, Chile on January 9, 1968, Nigeria (accession) on January 22, 1968, Honduras (accession) on February 13, 1968, Czechoslovakia on March 13, 1968, Mali (accession) on March 28, 1968, Somalia (accession) on March 29, 1968, Pakistan on April 14, 1969, Austria on June 12, 1969, Italy, with a reservation, on June 25, 1969, and the United States of America on November 24, 1969;

WHEREAS, pursuant to the provisions of paragraph 2 of Article 77 of the Convention, the Convention entered into force for the above-mentioned States on the thirtieth day after deposit of their respective instruments of ratification or accession and thus entered into force for the United States of America on December 24, 1969;

WHEREAS it is provided in paragraph 1 of Article VIII of the Protocol that the Protocol shall enter into force on the same day as the Convention or on the thirtieth day following the date of deposit of the second instrument of ratification or accession to the Protocol, whichever date is the later and it is provided in paragraph 2 of Article VIII that for each State ratifying or acceding to the Protocol after its entry into force the Protocol shall enter into force

on the thirtieth day after deposit by such State of its instrument of ratification or accession;

WHEREAS the following States deposited instruments of ratification of the Protocol, or, as noted, deposited instruments of accession: Dominican Republic on March 4, 1964, Upper Volta on August 11, 1964, Gabon on February 23, 1965, Switzerland on May 3, 1965, Kenya (accession) on July 1, 1965, Nepal (accession) on September 28, 1965, Philippines on November 15, 1965, Senegal (accession) on April 29, 1966, Liechtenstein on May 18, 1966, and Madagascar (accession) on February 17, 1967;

WHEREAS, pursuant to the provisions of paragraph 1 of Article VIII of the Protocol, the Protocol entered into force for the above-mentioned States on March 19, 1967, the same day as the Convention;

WHEREAS thereafter the following States deposited instruments of ratification of the Protocol: Panama on August 28, 1967, Austria on June 12, 1969, Italy on June 25, 1969, and the United States of America on November 24, 1969;

WHEREAS, pursuant to the provisions of paragraph 2 of Article VIII of the Protocol, the Protocol entered into force for the above-mentioned States on the thirtieth day after deposit of their respective instruments of ratification and thus entered into force for the United States of America on December 24, 1969;

NOW, THEREFORE, be it known that I, Richard Nixon, President of the United States of America, do hereby proclaim and make public the said Convention and Protocol to the end that the same and every article and clause thereof shall be observed and fulfilled with good

faith, on and after December 24, 1969, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this twenty-ninth day of January in the year of our Lord one thousand nine hundred seventy and of the Independence of the United States of America the one hundred ninety-fourth.

RICHARD NIXON

[SEAL]

WILLIAM P. ROGERS

Secretary of State

## APPENDIX 4

### Consular Relations Convention and Protocols Signed at Warsaw art. 29, May 31, 1972, 24 U.S.T. 1231.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Consular Convention between the United States of America and the Polish People's Republic and two related Protocols were signed at Warsaw on May 31, 1972, the texts of which, in the English and Polish languages, are hereto annexed;

The Senate of the United States of America by its resolution of March 27, 1973, two-thirds of the Senators present concurring therein, gave its advice and consent to the ratification of the Convention and Protocols;

The Convention and related protocols were duly ratified by the President of the United States of America on April 16, 1973, in pursuance of the advice and consent of the Senate, and were duly ratified on the part of the Polish People's Republic;

It is provided in Article 38 of the Convention that the Convention shall enter into force on the thirtieth day following the date of the exchange of the instruments of ratification and it is provided in the Protocols that the respective provisions thereof shall be considered integral parts of the Convention;

The instruments of ratification of the Convention and related Protocols were duly exchanged at Washington on

June 6, 1973, and accordingly the Convention and the related Protocols enter into force on July 6, 1973;

NOW, THEREFORE, be it known that I, Richard Nixon, President of the United States of America, proclaim and make public the Convention of May 31, 1972 and the related Protocols to the end that they shall be observed and fulfilled with good faith on and after July 6, 1973 by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this eighteenth day of June in the year of our Lord one thousand nine hundred seventy-three and of the Independence of the United States of America the one hundred ninety-seventh.

RICHARD NIXON

[SEAL]

By the President:

WILLIAM P ROGERS

Secretary of State

CONSULAR CONVENTION BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE POLISH PEOPLE'S REPUBLIC

The Government of the United States of America and the Government of the Polish People's Republic,

Desiring to regulate and develop consular relations between the two States,

Have decided to conclude a Consular Convention, and for that purpose the following Plenipotentiaries have been designated:

For the Government of the United States of America:
William P. ROGERS, Secretary of State,

For the Government of the Polish People's Republic:
Stefan OLSZOWSKI, Minister of Foreign Affairs, who have agreed as follows:

. . . .

Article 29

1. A consular officer shall have the right within his consular district to confer with any national of the sending State, to give him assistance or advice, and where necessary to arrange for legal assistance for him. If a national of the sending State desires to visit or communicate with his consular officer, the receiving State shall in no way restrict the access of the national to the consular establishments of the sending State or object to visits to such national by a consular officer of the sending State.

2. The appropriate authorities of the receiving State shall immediately inform a consular officer of the sending State of the detention or arrest of any national of the sending State who has not been admitted to permanent residence in the receiving State. In the case of the detention or arrest of a national of the sending State who has been admitted to permanent residence in the receiving State, the appropriate authorities of the receiving State, on the request of such national, shall immediately inform a consular officer of the sending State of such detention or arrest.

3. The receiving State shall forward without delay any correspondence from a national of the sending State detained or arrested in the receiving State addressed to a consular officer of the sending State. A consular officer shall upon his request be informed of the reasons for the detention or arrest of any national of the sending State. A consular officer may visit such national at any time and may communicate in writing with him in the language of the sending State or of the receiving State for the purpose of safeguarding his interests, with the observance, however, of the laws and regulations of the receiving State.

4. In case of a trial of a national of the sending State in the receiving State, the appropriate authorities of the receiving State shall, at the request of the consular officer, inform such officer of the charges against such national, and shall permit the consular officer to be present during the trial of such national, with the observance, however, of the laws and regulations of the receiving State.

5. A consular officer of the sending State shall have the right, subject to local prison regulations, to visit and communicate with a national of the sending State who is serving a sentence of imprisonment in the receiving State.

6. The rights of visiting and communicating provided in paragraphs 2, 3 and 5 shall be exercised in conformity with the laws and regulations of the receiving State, including prison regulations; provided, however, that the application of those laws and regulations shall not prevent a consular officer from visiting his national without delay, communicating freely with him, and obtaining information of the charges against him.

7. The provisions of paragraphs 1, 2 and 3 have appropriate application also to any person employed on a vessel

or aircraft of the sending State who is not a national of, or who has not been admitted to permanent residence in, the receiving State.

. . . .

IN WITNESS WHEREOF the respective Plenipotentiaries have signed the present Convention and have affixed thereto their seals.

Done in Warsaw on May 31, 1972, in two copies, each in the English and Polish languages, both texts having the same force.

(Signature)

William P. Rogers

(Signature)

Stefan Olszowski

. . . .

## APPENDIX 5

**TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 2005).**

**Art. 11.07. Procedure after conviction without death penalty**

Sec. 1. This article establishes the procedures for an application for writ of habeas corpus in which the applicant seeks relief from a felony judgment imposing a penalty other than death.

Sec. 2. After indictment found in any felony case, other than a case in which the death penalty is imposed, and before conviction, the writ must be made returnable in the county where the offense has been committed.

Sec. 3. (a) After final conviction in any felony case, the writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas.

(b) An application for writ of habeas corpus filed after final conviction in a felony case, other than a case in which the death penalty is imposed, must be filed with the clerk of the court in which the conviction being challenged was obtained, and the clerk shall assign the application to that court. When the application is received by that court, a writ of habeas corpus, returnable to the Court of Criminal Appeals, shall issue by operation of law. The clerk of that court shall make appropriate notation thereof, assign to the case a file number (ancillary to that of the conviction being challenged), and forward a copy of the application by certified mail, return receipt requested, or by personal service to the attorney representing the state in

that court, who shall answer the application not later than the 15th day after the date the copy of the application is received. Matters alleged in the application not admitted by the state are deemed denied.

(c) Within 20 days of the expiration of the time in which the state is allowed to answer, it shall be the duty of the convicting court to decide whether there are controverted, previously unresolved facts material to the legality of the applicant's confinement. Confinement means confinement for any offense or any collateral consequence resulting from the conviction that is the basis of the instant habeas corpus. If the convicting court decides that there are no such issues, the clerk shall immediately transmit to the Court of Criminal Appeals a copy of the application , any answers filed, and a certificate reciting the date upon which that finding was made. Failure of the court to act within the allowed 20 days shall constitute such a finding.

(d) If the convicting court decides that there are controverted, previously unresolved facts which are material to the legality of the applicant's confinement, it shall enter an order within 20 days of the expiration of the time allowed for the state to reply, designating the issues of fact to be resolved. To resolve those issues the court may order affidavits, depositions, interrogatories, and hearings, as well as using personal recollection. Also, the convicting court may appoint an attorney or a magistrate to hold a hearing and make findings of fact. An attorney so appointed shall be compensated as provided in Article 26.05 of this code. It shall be

the duty of the reporter who is designated to transcribe a hearing held pursuant to this article to prepare a transcript within 15 days of its conclusion. After the convicting court makes findings of fact or approves the findings of the person designated to make them, the clerk of the convicting court shall immediately transmit to the Court of Criminal Appeals, under one cover, the application, any answers filed, any motions filed, transcripts of all depositions and hearings, any affidavits, and any other matters such as official records used by the court in resolving issues of fact.

Sec. 4. (a) If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.

(b) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by and could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(c) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

Sec. 5. The Court of Criminal Appeals may deny relief upon the findings and conclusions of the hearing judge without docketing the cause, or may direct that the cause be docketed and heard as though originally presented to said court or as an appeal. Upon reviewing the record the court shall enter its judgment remanding the applicant to custody or ordering his release, as the law and facts may justify. The mandate of the court shall issue to the court issuing the writ, as in other criminal cases. After conviction the procedure outlined in this Act shall be exclusive and any other proceeding shall be void and of no force and effect in discharging the prisoner.

Sec. 6. Upon any hearing by a district judge by virtue of this Act, the attorney for applicant, and the state, shall be given at least seven full days' notice before such hearing is held.

Sec. 7. When the attorney for the state files an answer, motion, or other pleading relating to an application for a writ of habeas corpus or the court issues an order relating to an application for a writ of habeas corpus, the clerk of the court shall mail or deliver to the applicant a copy of the answer, motion, pleading, or order.

Supreme Court, U.S.
FILED
JUL 20 2006
OFFICE OF THE CLERK

(2)

No. 05-1079

# In The Supreme Court of the United States

RAFAL PIETRZAK,

*Petitioner,*

v.

STATE OF TEXAS,

*Respondent.*

**On Petition For Writ Of Certiorari To The Texas Court Of Criminal Appeals**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

In state habeas corpus proceedings brought by a Polish foreign national, are Texas state courts required to give effect to claims concerning failure to comply with consular notification requirements of the Vienna Convention on Consular Relations and the Warsaw Convention without regard to procedural default rules?

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, the State of Texas, respectfully requests this Court to deny the petition for writ of certiorari. The Question Presented has been fully answered adversely to Petitioner in *Sanchez-Llamas v. Oregon,* No. 04-10566, 2006 WL 1749688 (U.S. June 28, 2006), and no compelling reason exists to take up this petition to revisit the now-settled issue.

Additionally, Petitioner has not established a connection between the violation of his consular notification rights and any harm he suffered at trial, and suppression is not an available remedy.

## JURISDICTION

The Texas Court of Criminal Appeals denied Petitioner's application for writ of habeas corpus on November 23, 2005 without written order. Petitioner seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1257(a).

## STATEMENT OF THE CASE

### I. Procedural History

Petitioner was convicted of aggravated sexual assault of a child younger than fourteen years old, he was granted an out-of-time appeal, and his sentence was affirmed by the state court of appeals. *Pietrzak v. State,* No. 05-01-01687-CR, 2002 WL 31957883 (Tex. App. – Dallas Jan. 23, 2003, pet. ref'd) (not designated for publication).

The Texas Court of Criminal Appeals denied Petitioner's August 2003 state application for writ of habeas corpus without written order on the findings of the trial court without a hearing. *Ex parte Pietrzak,* No. 49,639-02 (Tex. Crim. App. Nov. 21, 2004) (not designated for publication). The Court of Criminal Appeals denied Petitioner's subsequent state application for writ of habeas corpus – the instant application – without written order. *Ex parte Pietrzak,* No. 49,639-03 (Tex. Crim. App. Nov. 23, 2005) (not designated for publication).

## II. Additional Material Facts

The claims raised in the instant application for writ of habeas corpus – that arresting officers violated Petitioner's right to consular notification under the Vienna Convention on Consular Relations and the Warsaw Convention – were not raised earlier in Petitioner's August 2003 application for writ of habeas corpus, in his direct appeal, or in any trial proceeding.

## ARGUMENT

### I. The Question Presented has been fully answered adversely to Petitioner by this Court's recent decision in *Sanchez-Llamas v. Oregon,* No. 04-10566, 2006 WL 1749688 (U.S. June 28, 2006), which was issued after Petitioner filed his petition for writ of certiorari

Under Texas state law, Petitioner procedurally defaulted his Vienna Convention and Warsaw Convention habeas corpus claims in two ways. First, he did not raise the claims at trial or on direct appeal. *See Ex parte Pena,*

71 S.W.3d 336, 338 (Tex. Crim. App. 2002); *Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex. Crim. App. 2001) (writ of habeas corpus may not ordinarily be used to litigate matters that could have been raised at trial and on direct appeal). Second, he did not raise the claims in his earlier August 2003 writ application. *See* TEX. CODE CRIM. PROC. art. 11.07, § 4 (barring claims raised in a subsequent writ application if those claims could have been raised in an earlier application).

In *Sanchez-Llamas v. Oregon*, this Court decided that claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims. *Sanchez-Llamas*, 2006 WL 1749688, at *17. The guiding principle that the procedural rules of domestic law, including procedural default, generally govern the implementation of an international treaty (*see id.*, at *14) would apply as well to Petitioner's Warsaw Convention claim. Thus, in accordance with *Sanchez-Llamas*, the Texas Court of Criminal Appeals was free to dismiss Petitioner's Vienna Convention and Warsaw Convention claims as procedurally defaulted.[1]

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[1] The Court of Criminal Appeals *denied* Petitioner's subsequent writ without written order. It did not, as Petitioner asserts (*see* Petition for Writ of Certiorari at 1, 7), adopt the trial court's findings of fact and conclusions of law, as those urged *dismissal* under article 11.07, section 4 of the Texas Code of Criminal Procedure (barring claims raised in a subsequent writ application if those claims could have been raised in an earlier application). *See Ex parte Thomas*, 953 S.W.2d 286, 288-89 (Tex. Crim. App. 1997) (distinguishing "denial" from "dismissal"); Appendix 2 to Petition for Writ of Certiorari. Petitioner's Question Presented nevertheless has validity to this case, since the denial of Petitioner's writ could have been based not on article 11.07, section 4 but on the fact

(Continued on following page)

Since the Question Presented in this case has already been decided adversely to Petitioner in *Sanchez-Llamas*, there is no compelling reason for this Court to grant certiorari. *See* Rules of the Supreme Court of the United States, Rule 10 (providing that review on writ of certiorari is not a matter of right, but of judicial discretion, and should be granted only when compelling reasons warrant). This Court should deny this petition for writ of certiorari.

## II. This Court should also deny this petition because (1) Petitioner has not established a connection between the violation of his consular notification rights and any harm he suffered at trial; and (2) the judicial remedy of suppression is not available

### A. Petitioner has not established a sufficient connection to harm

The heart of Petitioner's complaint is that he gave pre-trial videotaped and written statements and wrote a "note of apology" to his victim that were admitted at his trial. Petition for Writ of Certiorari at 7-8. He asserts that if he had been notified of his right to request assistance from the Polish Consulate he would have done so and "would ultimately have refused to give any statement." *Id.* at 8. But that is a purely speculative leap.[2]

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that he procedurally defaulted his claims at a more fundamental level by failing to raise them at trial or on direct appeal.

[2] It is simply not possible to know such things as whether and when Petitioner would have exercised his notification rights; whether and how the Polish Consulate would have responded to Petitioner's request for assistance; the reasons Petitioner desired to make his

(Continued on following page)

Equally speculative is Petitioner's assertion that the Polish Consulate would have provided additional investigation, particularly investigation in Poland yielding admissible mitigation evidence (*id.* at 8), and Petitioner does not even ground this speculation with any suggestion of any particular mitigating evidence that additional investigation could have uncovered.

Finally, Petitioner's assertion that the Polish Consulate would have helped him assert his Constitutional right to counsel and obtain competent counsel (*id.* at 8) ignores two facts. First, as this Court noted in *Sanchez-Llamas*, a foreign national detained on suspicion of crime, like anyone else in this country, is already entitled to an attorney and is protected against compelled self-incrimination. *See Sanchez-Llamas*, 2006 WL 1749688, at *11. Second, Petitioner did have the benefit of trial counsel. And as Petitioner acknowledges, that counsel has been found effective by the Texas Court of Criminal Appeals. Petition for Writ of Certiorari at 5.

In short, presented with little more than speculative harm, this Court has no compelling reason to redress the violation of Petitioner's consular notification rights.

### B. Suppression is not available

Using reasoning that would apply equally to the Warsaw Convention, this Court has held in *Sanchez-Llamas* that the judicial remedy of suppression is not available for a violation of the notification provisions of the

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statements and apologize to his victim; or how the involvement of the Polish Consulate would have influenced those reasons.

Vienna Convention. *See Sanchez-Llamas,* 2006 WL 1749688, at *11. Thus, to the extent Petitioner seeks suppression of his videotaped or written statement or his note of apology, he is not entitled to relief.

## CONCLUSION

For the foregoing reasons, Petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

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